SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1971

No. 71-836

ARTHUR ROMUALD DESCHAMPS, III

and

RANDOLPH DOUGLAS WOOD

Petitioners

v.

STATE OF IDAHO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OR CERTIORARI

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Respondent, STATE OF IDAHO, respectfully requests that the Petition for Writ of Certiorari in the above entitled matter be denied.

REASONS FOR DENYING THE WRIT

I.

In this case the Petitioners raise the

question as to whether or not sufficient probable cause for the issuance of a search warrant and warrants for arrest exist where the information supplied to the Magistrate consists solely of the officer-affiant's statement that he received an All Points Bulletin (APB) radio communication describing an automobile with two occupants believed to have marijuana in their possession and that he has picked up two men driving such an automobile. The reason Respondent requests that the Petition for Writ of Certiorari be denied is simply that probable cause existed and justified the actual arrest of the Petitioners upon the highway and also the subsequent issuance of a search warrant and warrant of arrest.

The Petitioners' rendition of the facts in this case begins somewhat belatedly. Petitioners begin with the receipt of an All Points Bulletin which led to the arrest of the Petitioners herein. However, some very significant instances occurred prior to the issuance of the All Points Bulletin in this case.

The complaining witness, Ben Blinn, was a hitchhike rider in the car driven by the Petitioners. Mr. Blinn testified at lenth to the incidents which occurred while he was riding as a hitchhiker in Petitioners' automobile. Upon terminating his ride with the Petitioners Mr. Blinn testified that he immediately pro-

ceeded to a telephone to contact the local police department and subsequently the Canyon County Sheriff's Department. Immediately thereafter Mr. Blinn testified that several Sheriff's cars arrived on the scene. It was at this time that Mr. Blinn conveyed the information that Petitioners were in possession of marijuana and other drugs and that he delivered to the authorities samples of the marijuana which he managed to conceal while riding with Petitioners. Mr. Blinn also gave a description of the Petitioners and of the vehicle which they were driving, (Transcript page 34, beginning at line 20):

> "A .I gave the substance, which I believed to be marijuana, to the officers and said that these men offered me marijuana and other drugs.
>
> Q Did you give them a description of the occupants of the automobile?
>
> A I gave them a description of the individuals in the automobile, the license number of the vehicle, the description of the vehicle, the color of the vehicle and the location of where I believed the drugs would be in the vehicles.
>
> Q You gave that to the police officers?
>
> A I gave that to the Sheriff."

As a result of this conversation with Mr. Blinn, Deputy Sheriff Dean Edwards testified, at page 41 of the Transcript, beginning at line 19, that he instructed his dispatcher and the Sheriff's Office at Caldwell, Idaho, to put out a broadcast on the police radio transmitting the information provided by Ben Blinn. The dispatcher, Russell Gibbin, testified at page 46 of the Transcript, beginning at line 29, through page 47, line 24, as to the contents of the All Points Bulletin which he put out over the air:

> "A At ten-fortyone a.m. I put out an all points bulletin to be on the watchout for a metallic green colored 1961 Mercury station wagon with a Montana license, pulling a trailer, U-Haul trailer with a motorcycle in it. The trailer had Washington license on it and there was two young fellows in the car.
>
> Q Did it contain any other things as to what you suspected or anything? What was in the bulletin?
>
> MR. RYAN: He is leading the witness. The witness has already answered the question as to what he put out and we would object.
>
> MR. JOSEPH: I want a complete report I was not leading the witness.
>
> THE COURT: I am going to permit the witness his testimony as to what he

put out if he recalls what he put out. However, I am admonishing the Jury at the same time that you are not to be considering this for the truth of the matter at this point. He is testifying as to what he did. You may answer if you put out anything else.

A I did, Your Honor. After describing the car and the trailer it was put out that there were two young fellows in it and that a hitchhiker talked to our Chief Deputy and he had been offered marijuana and some kind of pills and that this car was headed north on Highway 95 at this time."

At page 52 of the Transcript, beginning at line 16, the dispatcher's testimony as to the contents of the All Points Bulletin was stricken by the Court as not being the best evidence available to the State necessary to prove the contents of the bulletin However, the All Points Bulletin was admitted into evidence as State's Exhibit "1" at page 59 of the Transcript, line 4.

In the present case, the Respondent STATE OF IDAHO does not rely solely upon the APB broadcast over the police radio, for it is evident from the record that the subject matter from the APB was testified to directly by the complaining witness, Ben

Klinn, the informant. It was further testified to by Deputy Sheriff Edwards, further testimony, though not as to the subject matter of the All Points Bulletin, was received by the dispatcher himself, Russell Gibbin, all of whom are subject to cross examination by Petitioners' counsel.

An awareness of the foregoing facts which occurred prior to where Petitioners' statement of the case begins is extremely important to any determination in this case for the reason that a police communication will satisfy the constitutional probable cause requirement if it was issued with probable cause. United States v. Ayers, 426 F2d 524 (2d Cir. 1970), Coleman v. United States, 420 F2d 616 (D.C.Cir. 1969), Ojeda v. Superior Court, In and For County Monterey, 91 Cal.Rptr. 145, 12 Cal.App.3d 909 (1970). In the present case, the information which precipitated the issuance of the All Points Bulletin was supplied by a known and identified informant who had personally seen the marijuana in the possession of the Petitioners and who had given samples of this substance to the authorities prior to the initiation of the APB.

The Respondent, STATE OF IDAHO, contends that at the time the Petitioners were stopped and detained upon the highway, there was in fact a legal arrest, State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967); and

based on the previously recited facts, probable cause existed to justify the legality of police conduct at this point in time.

Petitioners contend that the case of Whiteley v. Warden, Wyoming State Penitentiary, ____ U.S. ___, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971), does not hold that an APB is ipso facto sufficient probable cause before a magistrate. With this the Respondent, STATE OF IDAHO, necessarily agrees. The Whiteley case, supra, concerned a situation where the court found the information supporting the communication had been supplied by an undisclosed informant, that it was inadequate, and that the ensuing arrest on the strength of such communication was without probable cause. However, the court also stated:

> "We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer

to rely on fellow officers to make the arrest." Whiteley v. Warden, Wyoming State Penitentiary ___ U.S. ___, 28 L.Ed.2d 306, 91 S.Ct.1031 (1971).

In essence, then the Respondent contends in justifying police conduct based upon an All Points Bulletin there must be a retrospective justification therefor and finding of probable cause. In Petitioners' case, contrary to the Whiteley case, supra, the informant was known and disclosed to the involved authorities. This informant not only saw the controlled substance in the possession of the Petitioners, but he also related the possible location of the controlled substance and he rendered up to authorities samples of this controlled substance, all prior to the issuance of the All Points Bulletin. Respondent STATE OF IDAHO would therefore suggest that it is not so much the APB itself which provides the probable cause to justify police procedure in this case, but the facts themselves which gave rise to the All Points Bulletin which manifests the probable cause and justified the police conduct.

Indeed, the Idaho Supreme Court recognized this supposition in its decision rendered in Petitioners' case

"...It is our conclusion that an official police communication does provide probable cause for either purpose so long as the communication itself is based upon sufficient information to constitute probable cause.

"Respondent cites several recent cases in which courts have found that a police communication will satisfy the constitutional probable cause requirement if it was issued with probable cause. These cases are: United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); Coleman v. United States, 420 F.2d 616 (D.C.Cir. 1969); Ojeda v. Superior Court, In and For County of Monterey, 91 Cal.Rep. 145, 12 Cal.App.3d 909 (1970). In the case at bar the information which precipitated the issuance of the APB was supplied by a known and identified informant who had personally seen the marijuana in the possession of the appellants. This provided a valid basis to issue the APB and established probable cause for the subsequent arrest and issuance of the search warrant.

"Appellants cite Whiteley v. Warden, Wyoming State Penitentiary, ___ U.S. ___, 91 S.Ct.1031, 28 L.Ed. 2d 306 (1971), as supporting their contention that an APB cannot supply probable cause for a warrantless arrest unless the arresting officer knows the facts causing its issuance. We cannot agree

that Whiteley can be so interpreted. That case concerned a situation where the court found the information supporting the communication had been supplied by an undisclosed informant, that it was inadequate and that the ensuing arrest on the strength of such communication was without probable cause. However, the court also stated:

> 'We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.' ____ U.S., at ____.

"Therefore, the United States Supreme Court has not disturbed those decisions which hold that there is probable cause for a warrantless arrest on the basis of an official police communication supported by information itself reliable enough to supply probable cause. Furthermore the conclusion to be reached from the above

quoted language is that the Court has specifically sanctioned such procedure." State v. Deschamps, et al, Idaho Supreme Court Opinions, Vol. 18, No. 84 (decided May Term, 1971).

Petitioners particularly question whether or not probable cause for the issuance of a search warrant and warrant for arrest exist where the information supplied the magistrate consists solely of the officer-affiant's statement that he received an All Points Bulletin radio communication describing an automobile with two occupants believed to have marijuana in their possession and that he has picked up two men driving such an automobile. In that regard the Supreme Court of the State of Idaho made the following comment:

> "...Appellants assert that the information contained in the unsupported APB was the only evidence presented to the probate judge to establish probable cause and that it was insufficient primarily because it was based on hearsay. The State however, contends that the information initiating the APB was supplied by a hitch-hiker given a ride by apellant, and this was also divulged to the probate judge.
>
> * * *
>
> "Since the APB provided probable cause for the warrantless arrest we find that

there was also probable cause for the issuance by the probate judge of the search warrant and subsequent warrant of arrest. At the pretrial conference Probate Judge Henderson testified:

> 'Q. Well I will withdraw that question: Will you tell The Court, if you will, the whole extent of the conversation that the sheriff revealed to you as to any facts prior that he revealed to you concerning this thing in the all points bulletin, any information he gave you?
>
> 'A. The position of the marijuana was mentioned and that the hitchhiker had told those people that there was marijuana in possession and that the hitchhiker himself had a marijuana with him and was possibly in his shirt pocket, if I remember correctly, and he had a pill in his shoe. Those two things struck me as odd.'

"Not only did the probate judge have the information in the APB before him, which we feel would have been sufficient, but he was also informed of the source of the communication." State v. Deschamps, et al, Idaho Supreme Court Opinions, Vol. 18, No. 84 (May Term, 1971).

What information, then, was provided Judge Henderson, enabling him to find the necessary probable cause to issue the search warrant and warrant

of arrest? Judge Henderson testified, beginning at page 4 of the Transcript, that prior to issuing the search warrant he obtained a deposition of facts to support the warrant and an affidavit from the Sheriff of Washington County, and that he discussed at some length the APB containing the information about the suspects, the Petitioners herein, and the fact that the information contained in the APB came from Ben Blinn, the informant hitchhiker. Based on the information contained in the APB, the deposition of facts and the clarifying discussion with the Sheriff to the effect that the informant had taken marijuana from the Petitioners and given it to the Sheriff (Tr. p. 12, L.16), Judge Henderson issued the warrants. Respondent STATE OF IDAHO does not deny that the information supplied by the hitchhiker informant, Ben Blinn, was not contained in the affidavit or deposition of facts in support of the search warrant, as required by Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509. This, however, in the Respondent's opinion, is not fatal to the State of Idaho's case against the Petitioners. Respondent has previously argued the legality of the probable cause arrest which took place when the Petitioners were stopped on the highway. In brief and in oral argument before the Honorable Supreme Court of the State of Idaho,

Respondent contended that the arrest of Petitioners was a legal arrest and justified apart from the subsequent arrest warrant. Respondent's contention remains the same before this Honorable Court; that is to say, regardless of any defectiveness in the arrest warrant, the initial confrontation between the police and the Petitioners upon the highway was based upon an All Points Bulletin founded upon probable cause and legal in all respects.

In regard to the subsequent search warrant which was issued in Petitioners' case, Respondent feels that it, too, was founded upon probable cause. It is Respondent's contention that the police would have been justified, because they had probable cause, in making a warrantless search of the Petitioners' automobile at the time of arrest. Chambers v. Maroney, 399 U.S. 42; 26 L.Ed 2d 419, 90 S.Ct. 1975 (1970). It is Respondent's further contention that by obtaining a subsequent search warrant from Judge Henderson, the officers adhered to and provided every possible constitutional safeguard available to the Petitioners.

The information contained in the Affidavit and deposition of facts was sufficient to support an independent judicial assessment of probable cause. In addition, however, the Judge was informed of the nature and source of this communique.

Respondent lastly contends that in accordance with the decision of the Honorable Supreme Court of the State of Idaho, since the APB provided probable cause for the warrantless arrest upon the highway, there was also probable cause for the issuance of the subsequent search warrant. Respondent is aware that the Whiteley case, supra, speaks to the independent judicial assessment of probable cause and issuance of a warrant of arrest prior to the initiation of an All Points Bulletin. Respondent is also aware that in the Petitioners' case no such judicial assessment had been made or warrant of arrest issued prior to the initiation of the APB. However, the Respondent contends that though this information was not communicated to a magistrate prior to the issuance of the APB, the information supporting the APB did give rise to probable cause and that this probable cause sustained throughout the facts of this case the legality of the police conduct.

WHEREFORE, Respondent STATE OF IDAHO respectfully prays that the Petition for Writ of Certiorari before this Honorable Court be denied.

DATED This 6th day of March, 1972.

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WHEREFORE, Respondent STATE OF IDAHO respectfully prays that the Petition for Writ of Certiorari before this Honorable Court be denied.

DATED This 6th day of March, 1972.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That I have on this 6th day of March, 1972, served the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by placing true and correct copies thereof in the United States mail, postage prepaid, addressed to:

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